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FIVE STAR HERITAGE SDN BHD & ORS v. PEGUAM NEGARA MALAYSIA & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
[CIVIL APPEAL NOS: 01(f)-3-02-2023(P), 02(f)-6-02-2023(P), 02(f)-7-02-2023(P) & 02(f)-8-02-2023(P)]
MARY LIM FCJ
NORDIN HASSAN FCJ
AB KARIM AB JALIL FCJ
5 DECEMBER 2023

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Abstract – *Amongst the many roles and duties of the Attorney General ('AG'), is the role and responsibility as custodian of the public interest; particularly in the matter of public, religious, social or charitable trusts. Such trusts are set up for the benefit of the larger sector of society and it is the AG's duty, particularly under s. 9 of the Government Proceedings Act 1956, to ensure that the intent of the relevant trusts is adhered to and safeguarded. The failure to comply with the mandatory requirements in s. 9 renders any action or suit instituted not maintainable. Hence, where a court proceeding is contemplated, s. 9 mandates that the person who moves the court must first obtain the written consent of the AG.*

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CIVIL PROCEDURE: *Action – Commencement – Charitable trusts – Challenge against court order by trustee – Whether consent of Attorney General ('AG') mandatory under s. 9 of Government Proceedings Act 1956 – Whether AG's power intended to protect charitable trusts from abuse and prevent proceedings affecting charity funds from unnecessary waste – Failure to obtain consent before filing of action – Whether AG has discretion to give consent after suit instituted – Whether failure to meet requirements rendered action invalid*

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TRUSTS: *Trustees – Charitable trusts – Challenge against court order by trustee – Whether consent of Attorney General ('AG') mandatory under s. 9 of Government Proceedings Act 1956 – Whether AG's power intended to protect charitable trusts from abuse and prevent proceedings affecting charity funds from unnecessary waste – Failure to obtain consent before filing of action – Whether AG has discretion to give consent after suit instituted – Whether failure to meet requirements rendered action invalid*

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WORDS & PHRASES: *'meneruskan' – Meaning of – Whether 'carry on' or 'continue' – Whether connotes permission or consent to proceed with what has already been started – Whether term has retrospectivity effect – Whether term found in s. 9 of Government Proceedings Act 1956*

I

Vide a trust indenture dated 30 May 1845, the East India Company created a Burmese-Siamese trust over a plot of land ('trust'). On the land, was a temple serving the Burmese and Siamese communities living on the island of Penang, and their successors in the trust. Expressly, the trust was 'for the management of the affairs of their Temple'. Four trustees, two from each community, were originally appointed to manage the affairs of the temple ('trustees'). The trustees, amongst others, had no 'right, power or authority whatsoever' to 'grant, bargain, sell, assign, transfer, convert or otherwise alienate the said piece of Ground or any part or parcel thereof'. The trust land 'shall remain, continue for the benefit of the Burmese and Siamese Community of Prince of Wales Island and its Dependencies from henceforth forever'. Despite the express terms and conditions, on 16 April 1994, the trustees entered into a written agreement to, *inter alia*, partition Lot 104 between the two communities. Lot 104 became Lots 2102 and 2103 with an order of court. The effect of that division left the temple remaining on the land held and still held by the Siamese trustees ('Lot 2102'), whilst the Burmese trustees continued to hold Lot 2103. The funds collected from the temple were also equally divided between the two communities. The Attorney General's ('AG') consent was obtained on 1 June 2000 ('first consent') confirming the partition of the original Lot 104 into Lots 2102 and 2103 and that the original trust had been terminated. Following this court order of 3 October 2002, the trustees for the Burmese community ('Penang Burmese trustees') executed a new trust deed dated 31 July 2006 ('trust deed'). On 25 August 2006, the Penang Burmese trustees, the applicants in the judicial review proceedings ('JR proceedings'), entered into a joint-venture agreement with Airmas Development Sdn Bhd to commercially develop Lot 2103 and obtained a court order dated 31 October 2007. As part of that development, Lot 2103 was subdivided into Lots 10029, registered in the name of the developer, and Lot 10030, registered with the Penang Burmese trustees. The developer then commenced an action at the Sessions Court against Nai Ninn Sararaksh ('Nai Ninn'), *inter alia*, for vacant possession of premises located on Lot 10029. Nai Ninn filed his defence and also counterclaim, claiming that he was the owner of the premises and was not obliged to deliver vacant possession as Lot 10029 was part of a charitable trust created under the 1845 indenture; and that the developer's ownership of Lot 10029 was questionable. This case was subsequently transferred to the High Court. Meanwhile, *vide* OS 1128 filed in 2014, Nai Ninn and Ho Choon Teik ('Ho') challenged the validity of the court order dated 31 October 2007, that because Lots 10029 and 10030 were part of a public charitable trust, the AG's consent under s. 9 of the Government Proceedings Act 1956 ('GPA') must first be secured. Since there was none, the order was invalid and must be set aside *ex debito justitiae*. Although OS 1128 was filed in 2014, both Nai Ninn and Ho themselves did not procure the AG's consent to file the action until 31 May 2016. Ho, who was not a party to OS 1128 when it was filed, armed with the AG's consent, intervened and was added as the second

plaintiff to OS 1128. Penang Burmese trustees, together with the developer and the Vice Chairman of the Penang Burmese Association, filed the JR proceedings to quash the AG's consent dated 31 May 2016. The JR proceedings were filed on 30 August 2016. The High Court allowed the claim in OS 1128 and set aside the joint-venture agreement; holding that the agreement was unlawful, illegal, null and void and of no legal effect. At the same time, the High Court held that the division of Lot 2103 into Lots 10029 and 10030 was similarly unlawful, illegal, null and void and of no legal effect; that the subsequent registration of these subdivided lots to the developer and the Penang Burmese Trustees was also null and void. Further, the High Court set aside the order of the High Court dated 31 October 2007. Whereas the JR application was allowed, and the AG's consent was quashed. The High Court held that the trust deed of 31 July 2006 was a private trust; and that all the earlier orders of the court, namely orders dated 19 October 1994, 3 October 2002 and 31 October 2007 were valid and binding. On appeal, the Court of Appeal allowed the appeals in respect of the JR proceedings whereas the decision of the High Court in respect of OS 1128 was allowed in part. The issue for determination in these appeals, *inter ali*a, was whether the consent of the AG could be retrospective in the light of the clear wordings and pre-requisites stated in s. 9(1) of the GPA and the mandatory nature of s. 9(2) of the GPA and whether such consent goes to jurisdiction.

Held (allowing appeals)
Per Mary Lim FCJ delivering the judgment of the court:

(1) In enacting s. 9 of the GPA, Parliament intended to empower the AG in the protection of charitable trusts from abuse and to prevent proceedings affecting the charity funds from unnecessary waste of such funds. However, the decision of the AG under s. 9 of the GPA is justiciable and thereby, reviewable by the court. The AG's power to grant or refuse consent is not absolute and is always subject to limits as prescribed by the statute itself. The failure to comply with the mandatory requirements in s. 9 renders any action or suit instituted not maintainable. In these appeals, not only was OS 1128 filed before the written consent of the AG was obtained, the written consent when finally obtained, was also clearly outside the terms prescribed by s. 9, which was quite aside from the fact that both Nai Ninn and Ho did not meet its mandatory requirements. (paras 19, 25 & 28)

(2) Section 9(1) and (2) provide, *inter alia*, that the AG only becomes involved under s. 9 where the trust is either an express or constructive trust set up for public, religious, social or charitable purposes. And, there must be an allegation of breach of such a trust; or the direction of the court is deemed necessary for the administration of such trust, in that, a court action is contemplated. Where proceedings in court are

indeed contemplated, s. 9 mandates that whoever is moving the court must first obtain the written consent of the AG and the written consent must be sought by two or more persons. The rationale being, the process allows scrutiny by the AG to check against abuse and wastage of funds and other resources. (paras 30-32)

(3) The reliefs sought in OS 1128 were within the reliefs set out in s. 9(1)(a) to (i). However, the impugned written consent was sought only after OS 1128 had already been filed and it was sought by just one, as opposed to the requisite two persons. Nai Ninn was the sole plaintiff in OS 1128 when it was filed in 2014. He did not secure the AG's written consent at the time of filing. Ho, on the other hand, applied to intervene and be joined as an additional plaintiff to OS 1128 which had already been filed by Nai Ninn. Both of them then made a single application and the AG gave his written consent. The written consent not only did not meet the terms of s. 9, it clearly exceeded the restrictions imposed by s. 9. It was a consent devoid of authority and mandate in several respects, thus, liable to be quashed, rendering OS 1128 as not maintainable. The High Court was right in issuing the order of *certiorari* quashing the said decision. (paras 34-37)

(4) The written consent of the AG uses the term 'meneruskan' which translates to mean 'carry on' or 'continue'. Such a term does not have the retrospectivity effect but merely connotes permission or consent to proceed with what has already been started. Such a consent takes effect from the date of the consent itself, which was, 31 May 2016 and not 15 December 2014, the date when OS 1128 was filed. This left OS 1128 bereft of the necessary consent at the material time when it was instituted in 2014. It must also be emphasised that the term 'meneruskan' is not found in s. 9 at all, especially in s. 9(1), in which case, the impugned consent was without the authority of law. Hence, the AG's consent of 31 May 2016 was without legal power or outside the terms of s. 9(1) and was thus invalid. (paras 41, 42 & 44)

(5) No error prevailed in the court records for any correction; the only error lay in the impugned consent. Hence, the court declined to apply the principle of *nunc pro tunc*. (paras 48 & 51)

(6) For the purposes of s. 9 of the GPA, the AG has no discretion to give consent after a suit has already been instituted. Worse when the application for consent is only made by a single person and not two or more persons. To say otherwise would defeat the 'filter' mechanism in the statute and the protective role that the AG plays as custodian of the public interest. In the circumstances, the impugned consent of 31 May 2016 was invalid and liable to be quashed. Since OS 1128 was instituted without the consent of the AG, the OS was incompetent and not maintainable. (paras 57-59)

Bahasa Melayu *Headnotes*

Melalui satu indentur amanah bertarikh 30 Mei 1845, East India Company membentuk amanah masyarakat Burma-Siam atas satu plot tanah ('amanah'). Di atas tanah itu terletak sebuah tokong untuk kegunaan komuniti Masyarakat Burma dan Siam yang menetap di Pulau Pinang, dan pengganti-pengganti dalam amanah itu. Jelas, amanah itu adalah untuk pengurusan hal ehwal tokong mereka. Pada asalnya, empat pemegang amanah, dua daripada setiap komuniti, dilantik untuk menguruskan hal ehwal tokong tersebut ('pemegang-pemegang amanah'). Pemegang-pemegang amanah tersebut, antara lain, tiada 'hak, kuasa atau apa-apa autoriti' untuk 'memberi, tawar menawar, menjual, meletak hak, meminda, menukar atau sebaliknya memberi milik bidang tanah tersebut atau mana-mana bahagian atau sebahagian daripadanya'. Tanah amanah itu 'sepatutnya kekal, diteruskan untuk faedah Komuniti Burma dan Siam Kepulauan Prince of Wales dan Tanggungannya mulai sekarang sehingga selama-lamanya'. Walaupun terdapat terma-terma dan syarat-syarat jelas tersebut, pada 16 April 1994, pemegang-pemegang amanah memasuki perjanjian bertulis, antara lain, untuk membahagikan Lot 104 antara kedua-dua komuniti. Lot 104 menjadi Lot 2102 dan 2103 dengan perintah mahkamah. Kesan pembahagian ini menjadikan tokong tersebut kekal atas tanah yang dipegang oleh pemegang-pemegang amanah masyarakat Siam ('Lot 2102'), manakala, pemegang-pemegang amanah masyarakat Burma terus memegang Lot 2103. Dana yang dikutip daripada tokong tersebut dibahagi sama rata antara kedua-dua komuniti. Persetujuan Peguam Negara ('AG') diperoleh pada 1 Jun 2000 ('persetujuan pertama') mengesahkan pembahagian Lot 104 yang asal menjadi Lot 2102 dan 2103 dan amanah asal telah dibatalkan. Berikutan perintah mahkamah ini bertarikh 3 Oktober 2002, pemegang-pemegang amanah masyarakat Burma ('pemegang-pemegang amanah masyarakat Burma') memeterai satu surat ikatan bertarikh 31 Julai 2006 ('surat ikatan'). Pada 25 Ogos 2006, pemegang-pemegang amanah masyarakat Burma, pemohon-pemohon dalam prosiding semakan kehakiman memasuki perjanjian usahasama dengan Airmas Development Sdn Bhd untuk membangunkan Lot 2103 secara komersial dan memperoleh perintah mahkamah bertarikh 31 Oktober 2007. Sebagai sebahagian pembangunan, Lot 2103 dipecahkan menjadi Lot 10029, yang didaftarkan atas nama pemaju, dan Lot 10030, yang didaftarkan atas nama pemegang-pemegang amanah masyarakat Burma. Pemaju kemudian memulakan tindakan di Mahkamah Sesyen terhadap Nai Ninn Sararaksh ('Nai Ninn'), antara lain, untuk milikan kosong premis yang terletak di Lot 10029. Nai Ninn memfailkan pembelaan dan juga tuntutan balas, mendakwa bahawa dia adalah pemilik premis tersebut dan tidak perlu memberi milikan kosong kerana Lot 10029 adalah sebahagian amanah pertubuhan amal yang dibentuk bawah indentur 1845; dan pemilikan Lot 10029 pemaju adalah dipertikaikan. Kes ini kemudian dipindahkan ke Mahkamah Tinggi.

Sementara itu, melalui saman pemula ('OS 1128') yang difailkan pada 2014, Nai Ninn dan Ho Choon Teik ('Ho') mencabar kesahan perintah mahkamah bertarikh 31 Oktober 2007, bahawa oleh sebab Lot 10029 dan 10030 adalah sebahagian amanah pertubuhan amal awam, persetujuan AG bawah s. 9 Akta Prosiding Kerajaan 1956 ('Akta') perlu diperoleh terlebih dahulu. Oleh sebab tiada persetujuan sedemikian, perintah itu tidak sah dan perlu diketepikan *ex debito justitiae*. Walaupun OS 1128 difailkan pada 2014, Nai Ninn dan Ho sendiri tidak memperoleh persetujuan AG untuk memfailkan tindakan sehingga 31 Mei 2016. Ho, yang bukan pihak dalam OS 1128 apabila itu difailkan, dengan persetujuan AG, campur tangan dan ditambah sebagai plaintif kedua dalam OS 1128. Pemegang-pemegang amanah masyarakat Burma, bersama-sama dengan pemaju dan Naib Pengerusi Pertubuhan Masyarakat Burma, memfailkan prosiding semakan kehakiman untuk membatalkan persetujuan AG bertarikh 31 Mei 2016. Prosiding semakan kehakiman difailkan pada 30 Ogos 2016. Mahkamah Tinggi membenarkan tuntutan dalam OS 1128 dan mengetepikan perjanjian usaha sama tersebut; memutuskan bahawa perjanjian itu tidak sah, menyalahi undang-undang dan batal dan tidak mempunyai kesan undang-undang. Pada masa yang sama, Mahkamah Tinggi memutuskan bahawa pemecahan Lot 2103 menjadi Lot 10029 dan 10030 juga tidak sah, menyalahi undang-undang dan batal dan tidak mempunyai kesan undang-undang; bahawa pendaftaran seterusnya lot-lot yang dipecahkan kepada pemaju dan pemegang-pemegang amanah masyarakat Burma juga adalah batal dan tidak sah. Selanjutnya, Mahkamah Tinggi mengetepikan perintah Mahkamah Tinggi bertarikh 31 Oktober 2007. Sementara itu, permohonan semakan kehakiman dibenarkan dan persetujuan AG dibatalkan. Mahkamah Tinggi memutuskan bahawa surat ikatan bertarikh 31 Julai 2006 adalah amanah persendirian; dan kesemua perintah mahkamah sebelum itu, iaitu perintah-perintah bertarikh 19 Oktober 1994, 3 Oktober 2002 dan 31 Oktober 2007 adalah sah dan mengikat. Atas rayuan, Mahkamah Rayuan membenarkan rayuan-rayuan berkaitan dengan prosiding semakan kehakiman manakala keputusan Mahkamah Tinggi berkaitan OS 1128 dibenarkan sebahagian. Isu untuk pertimbangan dalam rayuan-rayuan ini adalah, antara lain, sama ada persetujuan AG boleh menjadi retrospektif berikutan perkataan-perkataan jelas dan pra-keperluan yang dinyatakan dalam s. 9(1) Akta dan sifat mandatori s. 9(2) Akta dan sama ada persetujuan itu memberi kesan terhadap bidang kuasa.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Mary Lim HMP menyampaikan penghakiman mahkamah:

(1) Semasa menggubal s. 9 Akta, Parlimen meniatkan untuk memberi kuasa kepada AG untuk melindungi amanah-amanah amal daripada salah guna dan untuk menghalang prosiding-prosiding yang menjejaskan dana amal daripada pembaziran dana sedemikian. Walau bagaimanapun,

keputusan AG bawah s. 9 Akta adalah wajar dan, oleh itu, boleh disemak oleh mahkamah. Kuasa AG untuk memberi atau menolak persetujuan bukanlah mutlak dan sentiasa tertakluk pada batasan yang dinyatakan dalam statut itu sendiri. Kegagalan mematuhi keperluan mandatori dalam s. 9 menyebabkan apa-apa tindakan atau guaman yang dimulakan tidak boleh dikekalkan. Dalam rayuan-rayuan ini, persetujuan bertulis apabila akhirnya diperoleh, jelas luar terma-terma yang diperuntukkan oleh s. 9, selain fakta bahawa Nai Ninn dan Ho tidak memenuhi keperluan-keperluan mandatorinya.

(2) Seksyen 9(1) dan (2) memperuntukkan, antara lain, bahawa AG hanya boleh terlibat bawah s. 9 apabila amanah tersebut adalah amanah jelas atau konstruktif yang dibentuk untuk tujuan awam, keagamaan, sosial atau amal. Seterusnya, perlu ada dakwaan pelanggaran amanah tersebut; atau arahan mahkamah dianggap perlu untuk pengurusan amanah tersebut, iaitu, tindakan mahkamah dalam pertimbangan. Apabila prosiding-prosiding mahkamah sememangnya dipertimbangkan, s. 9 menyatakan bahawa siapa-siapa yang memulakan tindakan di mahkamah perlu, terlebih dahulu, memperoleh persetujuan bertulis AG dan persetujuan bertulis tersebut perlu diperoleh oleh dua atau lebih orang. Rasionalnya adalah proses tersebut membenarkan AG menyemak terhadap salah guna dan pembaziran dana atau sumber-sumber lain.

(3) Relief-relief yang dipohon dalam OS 1128 adalah dalam lingkungan relief-relief yang dinyatakan dalam s. 9(1)(a) hingga (i). Walau bagaimanapun, persetujuan bertulis yang dipertikaikan hanya diperoleh selepas OS 1128 difailkan dan dipohon oleh hanya seorang, dan bukan dua orang seperti yang diperlukan. Nai Ninn adalah satu-satunya plaintif dalam OS 1128 apabila itu difailkan pada 2014. Dia tidak memperoleh persetujuan bertulis AG pada masa pemfailan. Sebaliknya, Ho, memohon untuk campur tangan dan digabungkan sebagai plaintif tambahan dalam OS 1128 yang telah difailkan oleh Nai Ninn. Kedua-dua mereka kemudian membuat hanya satu permohonan dan AG memberikan persetujuan bertulisnya. Persetujuan bertulis tersebut bukan hanya tidak memenuhi terma-terma s. 9, malah jelas melangkaui batasan yang dinyatakan dalam s. 9. Itu adalah persetujuan tanpa kuasa dan mandat dalam beberapa hal, dengan itu, wajar dibatalkan, menjadikan OS 1128 tidak boleh dikekalkan dan Mahkamah Tinggi betul apabila mengeluarkan perintah *certiorari* membatalkan keputusan tersebut.

(4) Persetujuan bertulis AG menggunakan terma 'meneruskan' yang apabila diterjemah, membawa maksud, 'carry on' atau 'continue'. Terma sedemikian tiada kesan retrospektif tetapi hanya menunjukkan kebenaran atau persetujuan untuk meneruskan dengan apa-apa yang telah dimulakan. Persetujuan sedemikian berkuat kuasa dari tarikh

persetujuan itu sendiri, iaitu, 31 Mei 2016 dan bukan 15 Disember 2014, tarikh OS 1128 difailkan. Ini menjadikan OS 1128 tiada persetujuan yang diperlukan pada masa material apabila dimulakan pada 2014. Perlu ditekankan juga bahawa terma 'meneruskan' tidak didapati dalam s. 9 sama sekali, khususnya s. 9(1), iaitu, persetujuan yang dipertikaikan adalah tanpa kuasa dari segi undang-undang. Oleh itu, persetujuan AG bertarikh 31 Mei 2016 adalah tanpa kuasa undang-undang atau luar terma s. 9(1) dan, dengan itu, tidak sah.

(5) Tiada kesilapan dalam rekod-rekod mahkamah untuk apa-apa pembetulan; satu-satunya kesilapan adalah dalam persetujuan yang dipertikaikan. Oleh itu, mahkamah enggan mengguna pakai prinsip *nunc pro tunc*.

(6) Untuk tujuan s. 9 Akta, AG tiada budi bicara untuk memberi persetujuan selepas guaman dimulakan. Lebih malang, apabila permohonan untuk persetujuan diperoleh hanya oleh seorang dan bukan dua orang atau lebih. Menyatakan sebaliknya akan menjejaskan mekanisme saringan dalam statut dan peranan perlindungan yang dimainkan oleh AG sebagai penjaga kepentingan awam. Dalam hak keadaan sedemikian, persetujuan yang dipertikaikan bertarikh 31 Mei 2016 tidak sah dan boleh dibatalkan. Oleh sebab OS 1128 dimulakan tanpa persetujuan AG, OS tersebut tidak kompeten dan tidak boleh dikekalkan.

Case(s) referred to:

Cheah Ewe Chong & Anor v. Cheah Kee Ee & Ors [1934] CLJU 9; [1934] 1 LNS 9 HC ***(refd)***

Chin Chee Kow v. Peguam Negara Malaysia [2021] 1 CLJ 761 CA ***(refd)***

Hj Abdullah & Ors v. Ibrahim & Ors [1965] CLJU 48; [1965] 1 LNS 48 HC ***(refd)***

Kok Song Kong v. BSP Co Sdn Bhd [1988] CLJU 31; [1988] 1 LNS 31 CA ***(refd)***

Ledchumanan Nagappan v. R Nadarajah & Ors [1993] 4 CLJ 253 HC ***(refd)***

Lee Chick Yet v. Chen Siew Hee & Ors [1974] CLJU 70; [1974] 1 LNS 70 HC ***(refd)***

Lee Eng Teh & Ors v. Teh Thiang Seong & Anor [1966] CLJU 79; [1966] 1 LNS 79 HC ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***

Re Endacott [1959] 3 All ER 562 ***(refd)***

Subramaniam Vallan & Anor v. Dr S Sivasundaram & Ors [2016] CLJU 675; [2016] 1 LNS 675 HC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 471(1)

Federal Constitution, art. 145

Government Proceedings Act 1956, s. 9(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (2)

(Civil Appeal Nos: 01(f)-3-02-2023(P), 02(f)-6-02-2023(P), 02(f)-7-02-2023(P) & 02(f)-8-02-2023(P))

For the appellants - Karin Lim, A Suppiah, Julinder Daliwal & Alisa Lim Wei Zhen; M/s Aznil Naziah Juli & Praba

(Civil Appeal No: 01(f)-3-02-2023(P))
For the respondent - Shamsul Bolhassan, Mohammad Al-Saifi Hj Hashim, Nurul Farhana Khalid; SFCs, Nor Aqilah Abdul Halim & Nur Syazwani Abdul Aziz; FCs

(Civil Appeal No: 02(f)-6-02-2023(P) & 02(f)-7-02-2023(P))
For the respondent - T Gunalan Seelan, Balwant Singh Purba, Eng Yuh Pei & Tan Shin Yi; M/s Balwant Singh & Co

(Civil Appeal No: 02(f)-8-02-2023(P))
For the respondent - T Gunalan Seelan, Ong Ken-Jeen & Lee Min Yau; M/s Vello & Assocs

[Editor's note: For the Court of Appeal judgment, please see Nai Ninn Sararaksh v. Five Star Heritage Sdn Bhd & Ors And Other Appeals [2023] 5 CLJ 395 & Five Star Heritage Sdn Bhd & Ors v. Nai Ninn Sararaksh & Anor [2023] 5 CLJ 345 (overruled); Appeal from High Court, Kuala Lumpur; Judicial Review Nos: 24NCVC-1128-12-2014 & PA-25-32-08-2016 (overruled).]

Reported by S Barathi

JUDGMENT

Mary Lim FCJ:

[1] The central issue in these four appeals concerns the interpretation and understanding of the Attorney General's consent obtained under s. 9 of the Government Proceedings Act 1956 (Act 359).

[2] Of the four appeals, three appeals arose from the judicial review proceedings (JR proceedings), while the fourth appeal arose from proceedings related to Originating Summons No: 24NCVC-1128-12-2014 (OS 1128). We heard all four appeals together. After full consideration of the submissions, reasonings of the courts below and the records of appeal, we unanimously allowed the appeals.

Background Facts

[3] Both the JR proceedings and OS 1128 arose from these salient facts. *Vide* a trust indenture dated 30 May 1845, on behalf of Queen Victoria of the United Kingdom of Great Britain and Ireland, the East India Company created a Burmese-Siamese Trust over a plot of land known as Lot 104 in Georgetown subject to terms and conditions as found in the indenture (the trust). On Lot 104 was/is a temple serving the Burmese and Siamese communities living on the island of Penang, and their successors in the said trust. Expressly, the trust was "for the management of the affairs of their temple". Four trustees, two from each community, were originally appointed to manage the affairs of the temple (trustees). Amongst those terms and conditions was that the trustees had no "right, power or authority whatsoever" to "grant, bargain, sell, assign, transfer, convert or otherwise alienate the said piece of ground or any part or parcel thereof". The trust land

"shall remain, continue for the benefit of the Burmese and Siamese Community of Prince of Wales Island and its dependencies from henceforth forever". A

[4] Despite those express terms and conditions, on 16 April 1994, the trustees entered into a written agreement to, *inter alia*, partition Lot 104 between the two communities. Lot 104 thus became Lots 2102 and 2103 and an order of court dated 19 October 1994 (OS No: 24-665-1994 in the HC Penang) was secured to seal that agreement. The effect of that division left the temple remaining on the land held and still held by the Siamese trustees (Lot 2102). The Burmese trustees continued to hold Lot 2103. B

[5] On 3 October 2002, funds which had been hitherto collected from the temple amounting to over RM3,778,523.73 were equally divided between the two communities. Again, another order of court was secured to endorse the division of funds (OS No: 24-1209-2002). Effectively, this left the original trust now standing as two separate trusts, one for the Siamese community in respect of Lot 2102 and the other for the Burmese community in respect of Lot 2103. For this purpose, the Attorney General's consent was obtained on 1 June 2000. The High Court viewed this consent, referred to as the "first consent", as confirming the partition of the original Lot 104 into Lots 2102 and 2103 and that the original trust had been terminated. We will have more to say on this shortly. C D E

[6] Following this court order of 3 October 2002, the trustees for the Burmese community (Penang Burmese trustees) executed a new trust deed dated 31 July 2006 (trust deed). Amongst its many terms were these:

(i) subject to cl. 7 of the trust deed, that the Penang Burmese trustees shall have no power to sell the Penang Burmese trust property or any part thereof or mortgage the same or to create a charge to any third party thereon; F

(ii) pursuant to cl. 7, the Penang Burmese trustees shall have the power to enter into a joint venture agreement and/or transaction with any such future, potential develop and/or contractor to develop and/or construct and/or build on the Penang Burmese trust property upon such terms and consideration as the Penang Burmese trustees shall deem fit and proper and for the best interest and future benefit of the Burmese community in Penang. G H

[7] On 25 August 2006, the Penang Burmese trustees, the applicants in the JR proceedings, entered into a joint venture agreement with Airmas Development Sdn Bhd to commercially develop Lot 2103. A court order was obtained on 31 October 2007 to declare that this joint venture agreement was validly entered into by the parties. As part of that development, Lot I

2103 was subdivided into Lots 10029 and 10030. With the joint venture, the earlier was registered in the name of the developer whilst Lot 10030 was registered with the Penang Burmese trustees.

[8] The developer then commenced an action at the Sessions Court against Nai Ninn, *inter alia,* for vacant possession of premises located on Lot 10029. Nai Ninn filed his defence and also counterclaim, claiming that he was the owner of the premises and was not obliged to deliver vacant possession as Lot 10029 was part of a charitable trust created under the 1845 indenture and that the developer's ownership of Lot 10029 was questionable. This case was subsequently transferred to the High Court.

[9] Meanwhile, *vide* OS 1128 filed in 2014, Nai Ninn Sararaksh and Ho Choon Teik challenged the validity of the court order dated 31 October 2007, that because Lots 10029 and 10030 are part of a public charitable trust, the AG's consent under s. 9 of the Government Proceedings Act 1956 (Act 359) must first be secured before the order may be secured. Since there was none, the order was invalid and must be set aside *ex debito justitiae*. We understand Nai Ninn Sararaksh, who is of Siamese descent, lives on Lot 10029. In OS 1128, Nai Ninn Sararaksh and Ho Choon Teik have sued the developers as well as the Penang Burmese trustees.

[10] Although OS 1128 was filed in 2014, both Nai Ninn Sararaksh and Ho Choon Teik themselves did not procure the AG's consent to file the action until 31 May 2016. In fact, Ho Choon Teik was not even a party to OS 1128 when it was filed. Armed with the AG's consent, Ho Choon Teik then intervened and was added as the second plaintiff to OS 1128.

[11] Together with the developer and the Vice-chairman of the Penang Burmese Association, the Penang Burmese trustees filed the JR proceedings seeking to quash the AG's consent dated 31 May 2016. The JR proceedings were filed on 30 August 2016.

Decisions Of The High Court

[12] It is quite clear that the parties were fully aware of the two sets of proceedings. Unfortunately, the JR proceedings and OS 1128 were heard before different judges and disposed of at different times. There does not appear to be any effort to consolidate the actions. This would have greatly assisted in the better use of time and resources, be it of the court, counsel, or the parties themselves. Each component shares in that responsibility in the administration of justice; and every effort ought to have been made, especially in order to obviate any inconsistent decisions, as happened in these appeals.

[13] Insofar as OS 1128 was concerned, on 24 November 2017, the High Court allowed the claim and set aside the joint venture agreement; holding that the agreement was unlawful, illegal, null and void and of no legal effect.

At the same time, the High Court held that the division of Lot 2103 into Lots 10029 and 10030 was similarly unlawful, illegal, null and void and of no legal effect; that the subsequent registration of these subdivided lots to the developer and the Penang Burmese trustees was also null and void. Further, the High Court set aside the order of the High Court dated 31 October 2007. Injunctive orders were also issued, effectively restraining the joint venture agreement and the registration of the subdivided lots of Lot 2103.

[14] The JR proceedings took a longer time to be disposed of; aggravated by the appeals involved. Initially, leave was refused by the High Court on the basis that the AG's consent was not reviewable or justiciable. That decision was upheld on appeal. On 12 December 2018, the Federal Court allowed the appeal, set aside the decisions of the High Court and Court of Appeal and ordered the substantive application to be heard on its merits.

[15] On 29 September 2021, the High Court in the JR proceedings allowed the application and quashed the AG's consent. In addition, the High Court held that the trust deed of 31 July 2006 was a private trust; and that all the earlier orders granted by the court, namely orders dated 19 October 1994, 3 October 2002 and 31 October 2007 are valid and binding.

Decisions Of The Court Of Appeal

[16] Both parties appealed against those respective decisions. Thankfully, the appeals were heard by the same panel at the Court of Appeal. On 15 June 2022, the Court of Appeal allowed the appeals in respect of the JR proceedings whereas the decision of the High Court in respect of OS 1128 was allowed in part.

Our Decision

[17] On 30 January 2023, this court granted leave on the following three questions of law:

(i) whether the consent of the Attorney General can be retrospective in the light of the clear wordings and pre-requisites stated in s. 9(1) of the Government Proceedings Act 1956 and the mandatory nature of s. 9(2) of the same Act and the decisions of the High Court in the cases of *Ledchumanan Nagappan v. R Nadarajah & Ors* [1993] 4 CLJ 253 and *Subramaniam Vallan & Anor v. Dr S Sivasundaram & Ors* [2016] CLJU 675; [2016] 1 LNS 675 and whether such consent goes to jurisdiction?

(ii) in the light of the decision of the High Court which held that the subdivision of the original trust land should stay; that the land partitioned and given to the Burmese be vested in the remaining Burmese trustee and as the beneficiaries of the Burmese trust are ascertained or ascertainable individuals as held in *Re Endacott* [1959] 3 All ER 562, should the Burmese trust be construed as a private trust

or a public trust and whether the construction of a trust instrument and the original intention of the settlor under such circumstances, a question of law or a question of fact?

(iii) if a donor's dominant intent is to restrict the charitable gift to the exact purpose specified in the trust instrument and for no other purpose, is the court at liberty to presume that the donor still evinced a general charitable intent and effectuate the donor's intent by applying the *cy prés* doctrine to that gift?

[18] From the submissions, grounds of decisions and the records of appeal, we were clear that the determination of the first issue was sufficient to dispose of all four appeals.

[19] As indicated earlier, this court had already opined that the decision of the AG under s. 9 of the Government Proceedings Act 1956 (Act 359) is justiciable and thereby reviewable by the court. Further authorities may be gleaned from the decision in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; [2019] 3 MLJ 443; that the AG's power to grant or refuse consent is not absolute and is always subject to limits as prescribed in the statute itself.

[20] Section 9 states as follows:

> (1) In the case of any alleged breach of any express or constructive trust for public, religious, social or charitable purposes, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General or **two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute** a suit **or be joined** as a party in any existing suit on behalf of the Government or the public for the purpose of:
>
> (a) asserting any interest or right in the trust property;
>
> (b) removing any trustee;
>
> (c) appointing a new trustee;
>
> (d) vesting any property in a trustee;
>
> (e) directing accounts and inquiries;
>
> (f) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
>
> (g) authorizing the whole or any part of the trust property to be let, sold, mortgaged, charged or exchanged;
>
> (h) settling a scheme; and
>
> (i) obtaining such further or other relief as the nature of the case may require.

(2) No suit claiming any of the reliefs specified in subsection (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with that subsection. (emphasis added)

[21] From the reasoning of the Court of Appeal in appeals in relation to OS 1128, the AG's consent dated 31 May 2016 was upheld on the following grounds. At paras. 22 and 23, the Court of Appeal reasoned that:

[22] … there was nothing wrong or improper in the AG granting his written consent for OS 1128 for otherwise it would be oppressive for Nai Ninn who has been asked to vacate his house to defend himself and to inquire into how the land, once held under a public charitable trust had been transferred to Five Star.

[23] All that the AG allowed by his written consent is for Nai Ninn to ventilate his claim and for the Court to decide without taking side on the issue of the final outcome. We could not see how such a decision vested in him under s. 9 of the GPA could be said to have been given unreasonably or irrationally such that no right-thinking decision maker would have given his consent.

[22] At paras. 84 to 86, the Court of Appeal further rationalised why the AG's consent need not be obtained before the commencement of OS 1128. According to the Court of Appeal, the expression:

"… the Attorney General or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit or **be joined as a party in any existing suit on behalf of the Government or the public**" (emphasis added) in s. 9(1) of the GPA indicates to us that what is far more important in keeping with the rationale behind the written consent of the AG is that no frivolous action or suit is to be commenced or continued to completion without the AG having applied his mind to the action and having consented to it. If the action or suit has commenced already, then it is not to be continued, as would be a case where a second person is joined as a party to the action or suit, without the written consent of the AG.

[86] As the AG has no issue with that and was fully aware of the action that had been commenced, it would be pedantic and pointless to labour further on the point at which the consent in writing was given. There was also no application filed by the defendants to strike out the OS before the written consent of the AG was obtained. (emphasis added)

[23] In separate grounds written in respect of the JR proceedings, the Court of Appeal found that the AG did not act in bad faith when granting consent dated 31 May 2016; that it was important that "the AG did not take any partisan stand on the issues but left it to the parties to persuade the court". The Court of Appeal further found that it was not legally wrong for the AG's consent to be given as one of the issues which required probing was "how, why and when that a charitable trust for religious purpose could be turned

into a purported private trust, no less with a commercial pursuit". Consequently, the Court of Appeal found that there was "no good reason to review his decision".

[24] Amongst the many roles and duties of the Attorney General, an office constituted under art. 145 of the Federal Constitution, is the role and responsibility as custodian of the public interest; particularly in the matter of public, religious, social or charitable trusts. Such trusts are set up for the benefit of the larger sector of society and it is the AG's duty to ensure that the intent of the relevant trusts is adhered to and safeguarded.

[25] Some deliberations to this effect may be found in the decision of *Chin Chee Kow v. Peguam Negara Malaysia* [2021] 1 CLJ 761; [2021] 5 MLJ 303. There, the Court of Appeal correctly explained the intention of Parliament in enacting s. 9 of Act 359; that it is to empower the AG in the protection of charitable trusts from abuse and to prevent proceedings affecting the charity funds from unnecessary waste of such funds.

[26] Similar views may be found in the earlier cases of *Cheah Ewe Chong & Anor v. Cheah Kee Ee & Ors* [1934] CLJU 9; [1934] 1 LNS 9; [1934] 1 MLJ 212; *Hj Abdullah & Ors v. Ibrahim & Ors* [1965] CLJU 48; [1965] 1 LNS 48; [1965] 2 MLJ 189; and *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1966] CLJU 79; [1966] 1 LNS 79; [1967] 1 MLJ 42.

[27] In *Cheah Ewe Chong & Anor*, Whitley J cited and adopted Eldon LC's observations made in *Attorney General v. Green 1 Jacob & Walker* 303, that it is the duty of the court to take care that as little expense as possible should be incurred by the charity estate. Courts are reminded that safeguards are emplaced through s. 9 (then under s. 18 of the FMS Chapter 17, the precursor to Act 359) in order to prevent abuse, and to prevent proceedings against charitable trusts from being instituted too frequently for no other reason than because it is known that costs will be payable out of charity funds. In *Lee Eng Teh & Ors*, Gill J explained the consequences of non-compliance, that "… but for the consent of the Attorney General or his being made a party to the action, the present action would not be maintainable".

[28] The failure to comply with the mandatory requirements in s. 9 renders any action or suit instituted not maintainable. In these appeals, not only was OS 1128 filed before the written consent of the AG was obtained, the written consent when finally obtained, is also clearly outside the terms prescribed by s. 9. This is quite aside from the fact that both Nai Ninn and Ho did not meet its mandatory requirements.

[29] The significance of non-compliance with the requirements in s. 9 was explained in *Ledchumanan Nagappan v. R Nadarajah & Ors* [1993] 4 CLJ 253. There, the plaintiff, who was seeking certain declaratory orders from the court concerning the affairs of the Subramanian Temple at Batu Caves,

including an injunction to stop the celebration of Thaipusam at that temple, failed to obtain the prior written consent of the AG before instituting his action. The application was dismissed when the learned judge found, *inter alia,* that there was a "total failure to comply with the three preliminary requirements" under that provision. Although not named as a party, the AG's representative had attended court to express the view that the action should not be allowed to proceed since there was non-compliance of the requirements, namely, there must be in existence of at least two persons having an interest, the prior written consent of the AG, and the suit itself being brought in the name of the AG. The court agreed and was of the view that "it would not be necessary to say anymore", on that point.

[30] We agree with those principles and the approach. Sections 9(1) and (2) provide in quite clear terms how and when the AG becomes involved in such trusts, and what requirements must be met before matters relating to such trusts may be challenged in court. First, it is in the nature of trust itself. The AG only becomes involved under s. 9 where the trust is either an express or constructive trust set up for public, religious, social or charitable purposes. Next, there must be an allegation of breach of such a trust; or the direction of the court is deemed necessary for the administration of such trust. In simple terms, court action is contemplated.

[31] Where proceedings in court are indeed contemplated, s. 9 mandates that whoever is moving the court must first obtain the written consent of the AG. We can appreciate the rationale for such a requirement. As explained in the above case authorities, the process allows scrutiny by the AG to check against abuse and wastage of funds and other resources. Public, religious, social or charitable trusts are, by their very nature and intent, set up and intended for a larger community and purpose; serving an entirely different set of beneficiaries identified by some common cause or interest. Such trusts invariably would serve more than a single person.

[32] So, where there is an allegation of breach or where direction of the court is necessary for the administration of such trust, and some suit or proceeding is contemplated, it makes good sense that the written consent of the AG is first procured. And, according to s. 9(1), that written consent must be sought by two or more persons. Again, this makes good sense, appreciating the nature and character of such trusts. More than one disgruntled person or complainant must step forward to make that complaint and, secure the prior written consent of the AG.

[33] The next requirement is that the application must seek any of the reliefs set out in s. 9(1)(a) to (i).

[34] In respect of the first requirement, there is present the intention to sue for an alleged breach of trust for the reasons relied on. The reliefs sought in OS 1128 are also within the reliefs set out in s. 9(1)(a) to (i). However, the

impugned written consent was sought only after OS 1128 had already been filed and it was sought by actually just one as opposed to the requisite two persons. The application by Ho to be joined as a party to an existing suit similarly suffers defects due to non-compliance of s. 9.

[35] Section 9(1) also deals with joinder; that there must be two or more persons intending to join, and not just the single person like Ho here. Again, this is understandable given the nature and character of the trust. This, too, is on the basis that the suit already instituted is valid to start with. Where the suit to which Ho seeks consent for joinder is itself flawed for want of consent under s. 9, his application to join will not in the least alleviate the fatal deficiencies of the suit when it was first filed.

[36] In the present appeals, Nai Ninn was the sole plaintiff in OS 1128 when it was filed in 2014. He did not secure the AG's written consent at the time of filing. Ho, on the other hand, applied to intervene and be joined as an additional plaintiff to OS 1128 which had already been filed by Nai Ninn. The records show that both of them then made that single application on 20 August 2015 and the AG gave his written consent on 31 May 2016 in the following terms:

Akta Prosiding Kerajaan 1956 [Akta]
Persetujuan Di Bawah Seksyen 9(1)

PADA menjalankan kuasa-kuasa yang diberikan oleh Seksyen 9(1) Akta Prosiding Kerajaan 1956 [Akta 359], saya, TAN SRI DATO' SRI HAJI MOHAMED APANDI BIN ALI, Peguam Negara Malaysia dengan ini bersetuju dengan permohonan Encik Nai Ninn Sararaksh (No KP: 400324-07-5301, dan Encik Ho Choon Teik (No. KP: 750707-07-5261) bagi meneruskan satu prosiding di Mahkamah Tinggi Malaya Pulau Pinang melalui Saman Pemula No: 24NCVC-1128-12/2014 untuk mendapatkan perintah seperti berikut:

(i) satu perintah mengetepikan pendaftaran nama-nama Defendan-Defendan sebagai pemilik Lot 10029 dan Lot 10030 secara *ex debito justitiae* atas alasan ketiadaan bidang kuasa dan ketiadaan kebenaran Peguam Negara di bawah Seksyen 9 Akta Prosiding Kerajaan 1956;

(ii) satu perintah injunksi tetap yang menghalang Defendan-Defendan sama ada oleh dirinya sendiri, pengkhidmat-pengkhidmat, ejen-ejen mereka atau sesiapapun daripada bertindak sebagai pemilik berdaftar hartanah amanah awam;

(iii) satu perintah bahawa Defendan-Defendan mengemukakan penyata akaun bagi "Harta Amanah Keturunan Burma di Pulau Pinang" ("Penang Burmese Trust Property") kepada Mahkamah yang Mulia ini; dan

(iv) satu perintah bahawa segala wang yang telah digunakan oleh Pemegang Amanah Burma selepas 31.10.2007 berkenaan akaun hartanah amanah keturunan Burma Pulau Pinang dikembalikan dengan serta-merta dan didepositkan ke dalam Mahkamah yang Mulia ini dan kemudian pihak komuniti Burma Pulau Pinang.

Bertarikh: 31 haribulan Mei 201623

[37] In our view, this written consent not only does not meet the terms of s. 9(1), it clearly exceeds the restrictions imposed by s. 9. It is a consent devoid of authority and mandate in several respects. That being so, the written consent is liable to be quashed, rendering OS 1128 as not maintainable and the High Court was thus right in issuing the order of *certiorari* quashing the said decision.

[38] On the assumption that both Nai Ninn and Ho fulfil the conditions of having an interest in the trust, the application serves two different objectives depending on whose application we are addressing. For Nai Ninn, it was to institute a suit, or as it would appear, to regularise a suit which had already been filed at the time of the application for AG's consent. As for Ho, it was to be joined as a party to an existing suit, OS 1128. In either case, both are alone for their respective purpose. In our view, this distinction of separate purpose or objective illustrates that their respective application was and is outside the meaning of the words "two or more persons".

[39] Further, in the case of Nai Ninn, his application is obviously outside the terms of s. 9(1) as the AG's consent was sought long after he had filed OS 1128 on 15 December 2014; almost as an afterthought. As can be seen, s. 9(1) expressly requires the written consent to be procured before the suit is instituted. To say that consent may be sought and procured after court proceedings for the reliefs mentioned in s. 9(1)(a) to (i) have been instituted pays scant respect to the clear intention and requirements in s. 9(1).

[40] It also cannot be said that the AG is empowered to give consent retrospectively as this, quite clearly, runs contrary to the express terms of s. 9(1). Such an argument is like a double-edged sword as ironically, this suggests that Nai Ninn and Ho's own complaint that the court orders secured by the Penang Burmese trustees are invalid for want of prior written consent from the AG is unfounded since consent may be given retrospectively.

[41] In any case, the written consent of the AG uses the term 'meneruskan' which translates to mean "carry on" or "continue". Such a term does not have the effect of retrospectivity but merely connotes permission or consent to proceed with what has already been started. Such a consent takes effect from the date of the consent itself which is 31 May 2016 and not 15 December 2014, the date when OS 1128 was filed. This leaves OS 1128 bereft of the necessary consent at the material time when it was instituted in 2014.

[42] It must also be emphasised that the term "meneruskan" is not found in s. 9 at all, especially in s. 9(1) in which case, the impugned consent is without the authority of law. We find it not just difficult but a strain on the language to say that the words "institute" or "join" include "meneruskan".

[43] Perhaps, this becomes clearer when s. 9(1) is contrasted with the power to grant sanction in cases of insolvency under s. 471(1) of the Companies Act 2016 (Act 777). That provision reads as follows:

> 471(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

[44] Section 471(1) uses the words "proceeded with or commenced". This indicates that the power to grant leave to sue wound up companies is not limited to fresh actions or proceedings ("commenced") but extends to the instance where actions or proceedings have already commenced ("proceeded with"). In the latter, these actions may now proceed, carry on or be continued; or "meneruskan". Again, these words do not appear in s. 9(1) in which case, the AG's consent of 31 May 2016 is without legal power or is outside the terms of s. 9(1); and is thus invalid.

[45] In addition, the Court of Appeal has overlooked the presence of s. 9(2) which reminds the importance of compliance with the requirements of s. 9(1):

> No suit claiming any of the reliefs specified in subsection (1) **shall be instituted** in respect of any such trust as is therein referred to except in conformity with that subsection. (emphasis added)

[46] Section 9(2) reiterates the mandatory requirement of securing written consent before the institution of a suit. Since OS 1128 was instituted before AG's consent under s. 9(1) was obtained, it is not "in conformity with that subsection". While the AG has discretion on the matter of consent, it is with regard to the grant, refusal or imposition of terms or conditions to such request for consent. The consent at all times must, however, relate to a suit or proceeding which is yet to be instituted, and not to one which has already been instituted. In the latter case, the AG's consent is in respect of whether the applicants for consent may be joined as a party to that suit already filed. We must add that in the latter case of joinder of party(s), the institution of that suit must, in the first place, have complied with the terms of s. 9(1). In the case of OS 1128, no written consent was secured before it was instituted; aggravating the position yet further.

[47] We do not find the High Court decision of *Lee Chick Yet v. Chen Siew Hee & Ors* [1974] CLJU 70; [1974] 1 LNS 70; [1977] 2 MLJ 218 of assistance. Bearing in mind that it was a first-instance decision where the learned judge opined that the court could direct compliance of s. 9 within a

certain time period instead of striking out the whole action, that argument is flawed. Not only does it run contrary to the plain and unambiguous terms of s. 9(1), but as pointed out earlier, the Penang Burmese trustees similarly ought to have been given the same option.

[48] The respondents had urged this court to apply the principle of *nunc pro tunc*. With due respect, we decline to do so.

[49] The principle is generally applied to cases involving court decisions, where the court seeks to correct their records on clerical errors. *Black's Law Dictionary* explains the term as follows:

> 'Now for then' having retroactive legal effect through a court's inherent power the court entered a *nunc pro tunc* order to correct a **clerical error** in the record. Acts allowed to be done after the time when they should be done; *nunc pro tunc* nearly described inherent powers of court to **make the court records to speak the truth.** (emphasis added)

[50] That does not arise here at all. See also *Kok Song Kong v. BSP Co Sdn Bhd* [1988] CLJU 31; [1988] 1 LNS 31; [1988] 2 MLJ 440:

> In the light of our conclusion that on the facts of the present case we are able to hold that the suit was instituted on 18 April 1984, it may strictly be unnecessary for us to say or do anything further; but out of caution we will **direct that the writ be resealed *nunc pro tunc*,** that is to say, with the date, 18 April 1984, which it ought to have borne in the first place. We do this in exercise of the inherent jurisdiction which the court has over its officers, not under any of the provisions of the rules. Where the rights of a party are threatened by an act or default of an officer of the court, the court clearly has such a power to correct the matter.
> (emphasis added)

[51] No error prevails in the court records for any correction; the only error lies in the impugned consent for the reasons we have already explained.

[52] Before we leave this issue, we feel compelled to deal with a point made at para. 4 of the grounds of decision in respect of appeal on OS 1128. There, the Court of Appeal found that the written consent of the AG had been obtained in relation to the order dated 19 October 1994. We have poured through the records and we cannot find any consent to this effect.

[53] There are only two consents issued by the AG, the second consent dated 31 May 2016, the impugned consent has already been dealt with. The other consent, the first, is dated 1 June 2000 and it reads as follows:

Akta Prosiding Kerajaan 1956
Persetujuan Di Bawah Seksyen 9(1)

> PADA menjalankan kuasa-kuasa yang diberikan oleh subseksyen 9(1) Akta Prosiding Kerajaan 1956, saya, Tan Sri Datuk Seri Mohtar bin Abdullah dengan ini bersetuju dengan permulaan satu prosiding di Mahkamah Tinggi Pulau Pinang oleh Wong Hoong Keat (Penerima Harta

A Amanah Orang Thai/Burma di Pulau Pinang), (No. K.P. 3238892), Dr. Ko Ko Win (No. K.P. 9600855), U Khema Wuntha (No. K.P. US 035257736), Cheah Boo Eng (No. K.P. 4461657). Ong Ba Nee (No. K.P. 570101-07-5429), Prabandh Sanasen (No. K.P. 210819-71-5147) dan Songkeram @ Sungkram a/l Apau (No. K.P. 7644628) untuk memohon perintah-perintah seperti berikut:

B (i)

(a) Bahawa pelantikan Dr. Ko Ko Win, U Khema Wuntha, Cheah Boo Eng dan Ong Ba Nee yang beralamat di Dhammikarama Burmese Buddhist Temple, No. 24 Lorong Burma, 10250 Pulau Pinang sebagai Pemegang Amanah Komuniti Burma di Pulau C Pinang pada 22 Februari 1998 menggantikan Maung Boon Khan dan Hia Toon Toolseram disahkan oleh Mahkamah;

(b) Bahawa harta yang terletak di Lot 2103, Georgetown Seksyen 4, No. H.S. (D) 528, Daerah Timur Laut, Pulau Pinang diletakhak atas nama Dr. Ko Ko Win, U Khema Wuntha, D Cheah Boo Eng dan Ong Ba Nee sebagai Pemegang Amanah Komuniti Burma di Pulau Pinang;

(ii)

(a) Bahawa pelantikan Prabandh Sanasen dan Songkeram @ Sungkram a/l Apau yang beralamat di Chaiya Mangalaram E Buddhist Temple, No. 17, Lorong Burma, 10250 Pulau Pinang sebagai Pemegang Amanah tambahan Komuniti Thai di Pulau Pinang dalam Mesyuarat Agung Komuniti Thai di Pulau Pinang pada 6 September 1998 disahkan oleh Mahkamah;

(b) Bahawa harta yang terletak di Lot 2102, Georgetown, Seksyen F 4, No. H.S. (D) 527, Daerah Timur Laut, Pulau Pinang diletakhak atas nama Prabandh Sanasen dan Songkeram @ Sungkaram a/l Apau dan atas nama Pemegang Amanah yang sedia ada iaitu Bhikku Daeng a/l Nai Chan Satchap dan Sook Buranakol sebagai Pemegang Amanah Komuniti Thai di Pulau Pinang;

G (iii)

(a) Bahawa akaun terakhir Penerima Harta Amanah Orang Thai/ Burma disahkan dan harta amanah termasuk wang tunai dalam Simpanan Tetap dalam akaun bank diserahkan kepada Pemegang H Amanah kedua-dua tanah yang berkenaan iaitu Lot 2103 kepada Pemegang Amanah Komuniti Burma dan Lot 2102 kepada Pemegang Amanah Komuniti Thai;

(b) Bahawa Wong Hoong Keat, Penerima Harta Amanah Orang Thai/Burma di Pulau Pinang dilepaskan sebagai Penerima Amanah tersebut;

I

(iv) Bahawa semua kos yang timbul daripada tindakan ini dan kos permohonan ini dicukai dan diuntukkan daripada Amanah tersebut; dan

(v) Lain-lain relif yang difikirkan patut dan suaimanfaat oleh Mahkamah yang mulia ini.

Bertarikh pada 1 haribulan Jun 2000.

[54] With this consent, an order of court dated 3 October 2002 was obtained granting orders which essentially dealt with the appointment of trustees and the vesting of Lots 2102 and 2103 on the appropriate trustees:

Adalah Diperintahkan

1. bahawa Wong Hoong Keat, sebagai Penerima yang dilantik melalui Perintah Mahkamah Tinggi, Pulau Pinang bertarikh 14.12.1973, dilepaskan sebagai Penerima daripada mengutip segala sewa dan hasil (pendapatan) untuk harta amanah mengenai Amanah-amanah dalam suatu Dokumen Amanah menerusi Geran No. 2655 bertarikh 30.05.1845;

2. bahawa nama-nama Maung Boon Khan (K/P: A3103868) Hla Toon Toolseram (K/P: 3465236) dan Sook Buranakol (K/P 4083456) dibatalkan dan dikeluarkan daripada geran mengenai hakmilik tanah yang dikenali sebagai Geran No: 61389, Lot 2102, Daerah Timur Laut, Seksyen 4, Georgetown, Pulau Pinang (dahulu di kenali sebagai H.S.(D) 527, Lot 2102, Daerah Timur Laut, Seksyen 4, Georgetown, Pulau Pinang) dan Songkeram @ Sungkram a/l Apau (No KPT: 450515-02-5097) digantikan dan diletakhakkan sebagai Pemegang amanah;

3. bahawa nama-nama Bhikku Daeng a/l Nai Chan Satchapan (K/P: 2190061) dan Sook Buranakol (K/P: 4083456), simati, dibatalkan dan dikeluarkan daripada geran mengenai hakmilik tanah yang dikenali sebagai Geran No: 61390, Lot 2103, Daerah Timur Laut, Seksyen 4, Georgetown, Pulau Pinang (dahulu di kenali sebagai H.S.(D) 528, Lot 2103, Daerah Timur Laut, Seksyen 4, Georgetown, Pulau Pinang);

4. bahawa akaun dalam Afidavit bertarikh 19.09.2002 oleh Penerima Harta Amanah Komuniti Thai-Burma di Pulau Pinang, En. Wong Hoong Keat, disahkan dan diluluskan dan daripada wang sebanyak Ringgit Malaysia Tiga Juta Tujuh Ratus Tujuh Puluh Lapan Ribu Lima Ratus Dua Puluh Tiga dan Sen Tujuh Puluh Tiga (RM3,778,523.73) Sahaja dalam pegangan pihak Penerima setakat 30.6.2002, pihak Penerima diperintahkan:

   (i) membayar wang sebanyak Ringgit Malaysia Satu Juta Lapan Ratus Lapan Puluh Sembilan Ribu Dua Ratus Enam Puluh Satu dan Sen Lapan Puluh Enam (RM1,889,261.86) Sahaja kepada Tetuan Vello & Associates, Peguambela dan Peguamcara, Pulau

A Pinang untuk dan bagi pihak dan untuk membayar bersama-sama kepada Bhikku Daeng a/l Nai Chan Satchapan (K/P: 2190061) dan Songkeram @ Sungkram a/l Apau (KPT: 450515-02-5097) sebagai Pemegang-pemegang Amanah Komuniti Thai di Pulau Pinang; dan

B (ii) membayar wang sebanyak Ringgit Malaysia Satu Juta Lapan Ratus Lapan Puluh Sembilan Ribu Dua Ratus Enam Puluh Satu dan Sen Lapan Puluh Enam (RM1,889,261.86) Sahaja kepada Tetuan G. Raju and Company, Peguambela dan Peguamcara, Pulau Pinang untuk dan bagi pihak dan untuk membayar bersama-sama kepada Maung Boon Khan (K/P: A 3103868) dan
C Hla Toon Toolseram (K/P: 3465236) sebagai Pemegang-pemegang Amanah Komuniti Burma di Pulau Pinang

5. Bahawa pihak Penerima hendaklah memberi suatu akaun terakhir daripada 01.07.2002 sehingga 31.10.2002 dan selepas menolak peruntukan untuk kos, perbelanjaan dan lain-lain bayaran yang
D patut, membahagikan serisama wang-wang yang dalam pegangannya dan membayar setengahnya (1/2) kepada Tetuan Vello & Associates, Peguamcara dan Peguambela, Pulau Pinang untuk dan bagi pihak Pemegang-pemegang amanah Thai dan setengah (1/2) yang bakinya kepada, Tetuan G. Raju and Company, Peguamcara dan Peguambela untuk dan bagi pihak Pemegang-
E pemegang Amanah Burma.

6. Kos yang dipersetujui sebanyak Ringgit Malaysia Tiga Puluh Ribu (RM30,000.00) Sahaja diperuntukkan daripada tabung Amanah tersebut dan pihak Penerima hendaklah membayar wang sebanyak RM10,000.00 kepada Tetuan G. Raju and Company, RM10,000.00
F kepada Tetuan Vello & Associates dan RM10,000.00 kepada Tetuan Pregrave & Mathews sebagai peguamcara-peguamcara untuk pihak-pihak dalam perkara ini masing-masing; dan

7. Bahawa Pendaftar Hakmilik Tanah, Pulau Pinang hendaklah mendaftarkan perintah-perintah yang dibuat dalam perkara ini dalam geran-geran masing-masing.

G Bertarikh pada 3 haribulan Oktober 2002

[55] There is no mention, whether in the first consent or in this court order of the splitting of Lot 104. This is hardly surprising since Lot 104 had already been split as far back as 19 October 1994:

H **Adalah Diperintahkan:**

1. Bahawa harta amanah Thai Burmesa yang terletak di Lot No. 104 Seksyen 4, Georgetown, Daerah Timur Laut, Pulau Pinang dibahagikan mengikut pelan ukuran No. CAB/11/C/PG/92-P1 bertarikh 26 haribulan Ogos, 1993 dan Perjanjian untuk Pecah Milik
I bertarikh 16 haribulan April, 1994 dan Perjanjian Untuk Pengurusan Bersama ke atas Tanah Perkuburan bertarikh 16 haribulan April,

1994 dan bahagian yang ditanda "1" dalam pelan ukuran harta amanah tersebut didaftarkan dan diletakhak atas nama Pemegang Amanah Komuniti Thai dan bahagian yang ditanda "2" dalam pelan ukuran harta amanah tersebut didaftarkan dan diletakhak atas nama Pemegang Amanah;

2. Tanah Perkuburan yang terletak di bahagian yang bertanda "1" dan "2" dalam pelan ukuran harta amanah tersebut diurus bersama oleh Pemegang-Pemegang Amanah Komuniti Thai dan Burma;

3. Encik Chuah Ah Bah dari Jurukur Chuah & Rakan, seorang jurukur tanah berlesen dilantik untuk memohon bagi pecah lot dan pembahagian ke atas harta amanah tersebut; dan

4. Kos untuk permohonan ini dibayar dari kumpulan wang amanah.

Bertarikh pada 19 haribulan Oktober, 1994.

[56] For this "split" of Lot 104, there does not appear to be any consent from the AG, of any description, for what we see is a most critical departure from the 1845 indenture.

Conclusion

[57] For the above reasons, we find for the purposes of s. 9 of Act 359, learned AG has no discretion to give consent after a suit has already been instituted. Worse when the application for consent is only made by a single person and not two or more persons. To say otherwise would defeat the 'filter' mechanism in the statute and the protective role that the AG plays as custodian of the public interest.

[58] In the circumstances, the impugned consent of 31 May 2016 is invalid and is liable to be quashed. The High Court had rightly granted the orders sought in the JR proceedings. Question (i) is thus answered in the negative.

[59] In view of our answer to question (i), and since OS 1128 was instituted without the consent of the AG, that OS is incompetent and not maintainable. We, therefore, do not see the need to answer questions (ii) and (iii).

[60] The appeals in relation to the JR proceedings are thus allowed, and the decisions of the Court of Appeal dated 15 June 2022 are set aside, and the decision of the High Court is reinstated. In respect of the appeal in relation to OS 1128, the appeal is allowed, and the decisions of the Court of Appeal and the High Court are set aside.

[61] There is no order as to costs.